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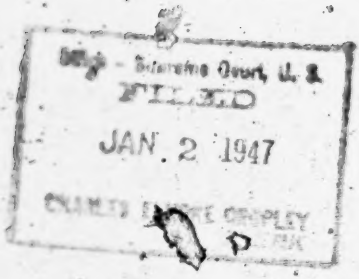

No. 840

In the Supreme Court of the United States

OCTOBER TERM, 1946

M. L. KENNEDY, WARDEN, PETITIONER

v.

UNITED STATES EX REL. JOHN MYRON KULICK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Acting Solicitor General, on behalf of the petitioner, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered October 29, 1946 (R. 87), ordering respondent discharged from petitioner's custody.

OPINION BELOW

The opinion of the circuit court of appeals (R. 81–87) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 29, 1946 (R. 87). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, after conviction for refusing to submit to induction, respondent is entitled to resort to habeas corpus to challenge the judgment of conviction on the ground that the convicting court improperly rejected his proffered defense that his selective service classification was invalid.

2. If habeas corpus is an available remedy, whether the inquiry by the habeas corpus court should be limited to the question whether the defense was tendered and rejected by the convicting court or whether the habeas corpus court should also inquire into the jurisdiction of the classifying board.

STATEMENT

Respondent was indicted (R. 22) for refusing to submit to induction on November 9, 1944, in violation of the Selective Training and Service Act. He had a jury trial in the District Court for the Southern District of New York at which his selective service file was received in evidence, but other evidence proffered by him purportedly for the purpose of showing that his selective service classification was invalid was excluded, and the jury was instructed that the classification was final and not open to attack in

the criminal trial (see R. 14–15, 86–87). He was convicted, and on May 7, 1945, he was sentenced to imprisonment for three and one-half years (R. 21). He did not appeal (see R. 83). Thereafter, on February 27, 1946, he filed a petition for a writ of habeas corpus in the District Court for the District of Connecticut challenging the validity of his imprisonment under the judgment of conviction (R. 6–19). Briefly, the petition alleged that the judgment was void (1) because respondent is a minister of religion and the selective service boards therefore had no jurisdiction over him, (2) because the judicial proceedings were founded on a void induction order, and (3) because at his criminal trial respondent was denied the opportunity to prove "any substantial defense" to the indictment. Respondent alleged in detail the facts upon which he predicated these contentions and he prayed that the court review the question of his exemption from duty under the Act and the proceedings before the classifying boards.

The writ issued on February 27, 1946 (R. 23–24), and petitioner filed a return (R. 26–29) and a supplemental return (R. 30–33) challenging the power of the court to review the judgment of the convicting court and the proceedings before the selective service boards and setting forth a chronological summary of the administrative proceedings. At the habeas corpus hearing petitioner tendered to the court, *inter alia*, respondent's selective service file and a transcript of the proceed-

ings at respondent's criminal trial, both of which were admitted in evidence (see R. 37–40). Respondent introduced in evidence a copy of his requests to charge and exceptions to the charge of the convicting court (R. 44–45, 47–51). He tendered no other evidence in the habeas corpus court.

In a memorandum opinion (R. 52–72), the district court below held that habeas corpus was available to respondent to determine whether he had been denied any constitutional right (R. 55), and it then turned to the questions whether there was a basis in fact for the refusal of the selective service boards to classify respondent as a minister and whether the boards failed in any material respect to comply with the Selective Service Regulations. The court held that there was evidence to support the classification, that there was no evidence of arbitrary or capricious administrative action, and that respondent had not been denied any procedural right (R. 67–70). Having thus determined that the administrative action was "valid in law and in fact," the court concluded that respondent had not been deprived of a valid defense by the convicting court (R. 72). Accordingly, the writ was discharged. Respondent was thereafter released on bail pending appeal (R. 73–74).

Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was reversed (R. 87). The court held that habeas corpus

was available to respondent, and that it is in the nature of a substitute for an appeal from the conviction, although respondent failed to take such an appeal. Reasoning from the premise that respondent was entitled to show, if he could, the invalidity of his induction order at his criminal trial, the court reversed the judgment of the district court discharging the writ of habeas corpus because respondent had not been allowed to make the defense at his trial. The circuit court of appeals did not pass on the question of the local board's jurisdiction.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that habeas corpus is an available remedy to inquire into the validity of the ruling of the convicting court rejecting respondent's proffered defense of invalid classification.

2. If habeas corpus is an available remedy, in failing to inquire into the jurisdiction of the local board, as the *Estep* opinion requires.

3. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

1. In *Estep* v. *United States*, 327 U. S. 114, 124, this Court said that where, as here, a proffered defense of illegal classification is rejected at the criminal trial for refusing to submit to induction, habeas corpus after conviction is available "to

challenge the jurisdiction of the local board." This means, we think, that the habeas corpus court should conduct a collateral inquiry into the legality of the induction order, and that the petitioner is to be discharged from custody only if it is determined that the local board exceeded its jurisdiction. Quite plainly, the habeas corpus court can decide a challenge to the jurisdiction of the board only by examining the administrative record and any other pertinent evidence for the purpose of determining whether there was a basis in fact for the classification or whether the local board departed from the selective service regulations in any substantial respect.

This is the view which the Circuit Court of Appeals for the Fourth Circuit adopted in *Sunal* v. *Large*, 157 F. 2d 165, which is now pending on petition for a writ of certiorari, No. 535, and it is the view which the district court adopted in this case. Both courts inquired into the jurisdiction of the local board and, having determined in each case that the classifying boards had not exceeded their jurisdiction, the courts remanded the prisoner to the custody from which he sought release. The court below, however, has taken a different view. Without adverting to the dictum in the *Estep* opinion that habeas corpus after conviction will lie for the purpose of testing the jurisdiction of the local board and without passing on the question of the jurisdiction of the local board, the circuit court of appeals ordered respondent dis-

charged from petitioner's custody because the convicting court refused to admit respondent's proffered defense of illegal classification. In so ruling, the court failed to adhere to the *Estep* decision, and it rendered a decision which is in conflict with the Fourth Circuit's decision in the *Sunal* case.

2. The decision below proceeds on a theory different from the theory indicated in the *Estep* and *Sunal* cases. Instead of inquiring into the jurisdiction of the local board, the court below limited its inquiry to the proceedings in the convicting court, and, having concluded that that court erred in rejecting the proffered defense of misclassification, the court held that the judgment of conviction was void. We think there is no warrant in habeas corpus law for this position. The error of the convicting court consisted in its misconstruction of the provision of Section 10 (a) (2) of the Selective Training and Service Act that the classification of the selective service boards shall be final. This was an error in the exercise of jurisdiction which was correctible on appeal. It does not assume the proportions of a jurisdictional defect, and it is not a denial of any constitutional right. This, we think, is aptly illustrated by the decision in *Collins* v. *Johnston*, 237 U. S. 502. In that case, a petition for habeas corpus was predicated on the claim that the petitioner, who had been convicted of perjury, was deprived of due process because the convicting

court refused to consider "a valid and legally conclusive defense," viz., that the false testimony upon which the prosecution was predicated was not material to the trial in which it was given. In respect of the question whether the convicting court lost its jurisdiction by denying the proffered defense, this Court said (237 U. S. at 507):

> Nor are we able to see that the refusal of the proffered defense, even were such refusal erroneous, could at all affect the jurisdiction of the court, or amount to more than an error committed in the exercise of jurisdiction. The averment that the defense was "arbitrarily refused" merely states a conclusion of law, and is of no effect in the absence of facts sufficient to show that the ruling was in truth arbitrary; and no such facts are alleged.

The same conclusion was reached by the Circuit Court of Appeals for the Fifth Circuit in *Rea* v. *McDonald*, 153 F. 2d 190, certiorari denied, 327 U. S. 794.

Significantly, the court below did not seek to sustain its decision on the theory that the convicting court lost its jurisdiction by the erroneous exclusion of the proffered defense or that respondent was deprived of due process in the convicting court. Instead, adverting to *Bowen* v. *Johnston*, 306 U. S. 19, the court pointed out that exceptional circumstances required relief by habeas corpus in this case. However, *Bowen* v. *Johnston* involved a question of jurisdiction of the convicting court,

and the exceptional circumstances in that case were invoked to justify an inquiry into that question even though the prisoner had not appealed from his conviction. As we understand it, the decision does not contemplate that merely because a defendant may be able to show good reason for not having appealed from the judgment of conviction he may resort to habeas corpus to correct a trial error, which is the situation in this case.

The consequence of the doctrine of the court below is that in almost every case such as this the selectee will be entitled to secure his release from imprisonment and a new trial in which inquiry will be made for the first time into the jurisdiction of the local board. If his defense fails at the new criminal trial, he will be sentenced anew and probably commence a new term of imprisonment. Under the view announced in the *Estep* decision and which the Fourth Circuit followed in the *Sunal* case, the habeas corpus court itself inquires into the jurisdiction of the local board. If the court determines that the board exceeded its jurisdiction, the prisoner is discharged from custody and the case is ended. On the other hand, if the court reaches a contrary conclusion, the prisoner is required to serve the remainder of the sentence imposed upon him. In neither event does a new criminal trial become necessary and the interests of both sides are fully protected.

3. This case presents more than the question whether the habeas corpus court should limit itself

to determining whether the proffered defense was rejected in the convicting court or should go further and determine whether the local board exceeded its jurisdiction; it presents as well the broader question whether habeas corpus is an available remedy where there was no appeal from the judgment of conviction and where the convicting court had jurisdiction and did not deny the defendant any constitutional right. See *Rea* v. *McDonald*, 153 F. 2d 190 (C. C. A. 5), certiorari denied, 327 U. S. 794. The language of the *Estep* decision bearing on the availability of habeas corpus is obiter dicta phrased in terms of "it would seem." 327 U. S. at 124. As such, it is open to critical examination in this case, and in view of the novelty of the view expressed,[1] we submit that such examination is necessary.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

JANUARY 1947.

[1] None of the deportation cases to which the Court adverted in the *Estep* decision and which involved inquiries into the jurisdiction of the administrative agency, was concerned with a situation like that in this case, where an intervening judgment of a court of competent jurisdiction stands unreversed and the prisoner is confined pursuant to that judgment, not pursuant to the administrative order.

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